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82-510
No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE FINCH and VESTA MAE FINCH,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Attorney for Muskogee County, State of Oklahoma, brought criminal charges against Eugene Finch and Vesta Mae Finch for knowingly concealing stolen property. The warrantless arrest of Eugene Finch was accomplished by enticing him to the doorway of his home before arresting him, and the search and seizure of automobiles in the driveway of the home was made without a search warrant, although ample time to sercure a warrant was available, and no exigent circumstances existed.

The questions thereby arising are:

1. Whether the action of the police in asking Eugene Finch to step outside for a talk and then arresting him without warrant, violated his Constitutional rights under the Due Process Clause of the Fourteenth Amendment.

2. Whether the action of the police in seizing and searching the immobile vehicles in the Petitioners' driveway without a search warrant, although sufficient time existed to obtain a warrant, and the officers searching and seizing even discussed at length whether a warrant was necessary, violated the Petitioners' Fourth Amendment rights against unreasonable search and seizure.

3. Whether the requirements, that a valid search warrant be obtained where no exigent circumstances existed, were ignored in this case. Sufficient time existed to obtain a warrant (3 days). The police considered getting a warrant. An assistant District Attorney advised that they could "get by" without one. The casual way the surveillance was conducted negated the possibility of exigent circumstances.

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No. .....

In the
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EUGENE FINCH and VESTA MAE FINCH,
Petitioners,
v.
THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The petitioners, Eugene Finch and Vesta Mae Finch, pray that a writ of certiorari issue to review the two to one (2 to 1) opinion and judgment of the Court of Criminal Appeals of the State of Oklahoma rendered in these proceedings on the 11th day of May, 1982.

OPINION BELOW

The opinion of the Court of Criminal Appeals, *Finch* v. *State of Oklahoma*, 644 P.2d 1378 (Okl.Cr. 1982), appears as Appendix A hereto.

JURISDICTION

The order or judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on June 28, 1982 (see Appendix A). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

AMENDMENT XIV, Sec. 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without the due process of law; . . ."

STATEMENT OF FACTS

The facts in this case are: that Officer Terry Blackford of the Oklahoma Highway Patrol received a call from Officer Larry Clayton of the Tulsa Police Department. He testified that Officer Clayton asked him to go by the Defendants' (Petitioners') house and gave him the address, stating that he had information there were stolen cars in the driveway, including a maroon and white van. He was also provided with the tag number for the van. Officer Blackford testified he went by the house, checked and saw several automobiles in the driveway. He stated that he observed the described van, but that he could not see the tag as the van was backed up to the house. He testified he observed a Corvette and a white Lincoln Mark IV in

the driveway; that he returned home, checked the tag number through the N.C.I.C. for the Corvette and found that it belonged on the white Continental Mark IV, which had been reported stolen from Boley, Oklahoma. He testified he called his supervisor, Lt. Tutton, advising him of the call from Officer Clayton and what he had found. He testified he then called Officer Clayton and related to him the information and was asked to hold off for the time being. He testified the next day Officer Clayton called him at home stating that he had information the van would be coming to Tulsa in the next day or so to receive stolen property at a northside shopping center and just to keep a check on things. Officer Blackford testified he drove by every day for the next three or four days and as many as two or three times per day. He testified the van was never moved from the position where it was backed into the garage. He testified that the other cars were there with the exception that once in a while one might be gone, but that it would be there when he would go back again. He testified that in going back and forth to the house of the defendants (Petitioners) he got another tag number, he was not sure which car, which he checked and it also checked out to be stolen. He testified he kept Officer Clayton and his supervisor posted at all times regarding these matters.

Officer Blackford further testified that Officer Clayton called him on November 6, 1978, a little after 5:00 p.m., while it was still daylight; that Clayton told him two Tulsa Police Department officers had been sent to the house to observe the automobiles and the house; that someone left the house, drove to their car, rolled down the window and then went back to the house. Officer Clayton further told

Blackford that he did not know if it was a male or female but that they had been "burned" and they would have to move on it. Officer Blackford testified he called Muskogee Assistant District Attorney Weldon Stout, his supervisor, and Highway Patrol Headquarters to discuss the situation. He testified that he talked to Assistant District Attorney Weldon Stout about whether or not a search warrant should be obtained and that Mr. Stout told him they did not need a search warrant. They then all got together and went to the house of the defendants (Petitioners), arriving shortly after 9:30 p.m. Officer Blackford did testify it was nighttime when they arrived. Officer Blackford testified he went to the door, rang or knocked on the door, and that the defendant Eugene Finch (Petitioner here) answered. He stated he told the defendant he had found certain stolen automobiles in the driveway and advised him of his rights. The defendant Eugene Finch was placed under arrest and placed in a patrol unit. There were a great many other officers present at the time and a search of the vehicles was begun.

The search of the vehicles located at the house and a check of the serial numbers showed that several of the automobiles were stolen. The State had known for at least three or four days prior to the arrest of the defendant Finch and the search of the vehicles, that two of the vehicles were stolen. This fact had been confirmed by Officer Blackford through N.C.I.C. The fact that at least two of the cars on the premises were stolen, and the probability that the maroon and white van was also stolen, was well known to the State three or four days prior to the arrest and search and seizure of the automobiles.

None of the exceptions to the rules that warrants are necessary to protect the Constitutional Rights of citizens existed. By the testimony of the police witnesses, they had several days in which to obtain the necessary warrants, and had probable cause. They did not do so, not because there was not ample time to obtain the warrants, but because they erroneously believed no warrants were necessary. These violations of the defendants' Constitutional Rights led to the admission of evidence that was so prejudicial as to require reversal. The law requiring warrants of arrest and search warrants, when no exigencies exist, is clear and unequivocal.

The landmark case of *Coolidge* v. *New Hampshire*, 403 U.S. 443, 21 L.Ed. 564 (1971), held that since the police knew of the presence of the automobile and planned all along to seize it, there were no exigent circumstances justifying their failure to obtain a valid warrant, and the fruits of the unconstitutional seizure of the automobile were inadmissible, and that the doctrine of "plain view" could not justify the police seizure of the accused's automobile under the circumstances of the present case.

Arkansas v. *Sanders*, 443 U.S. 753, 61 L.Ed.2d 235 (1979), *Lo-sr. Sales, Inc.* v. *State of New York*, 442 U.S. 311, 60 L.Ed.2d 960, *G.M. Leasing Corp.* v. *U.S.*, 429 U.S. 338, 50 L.Ed.2d 530, and *Payton* v. *New York*, 445 U.S. 573, hold the Fourth Amendment is applicable to the States by the Fourteenth Amendment, and prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest, and evidence so obtained should be suppressed.

These arrests should be invalidated, the evidence suppressed and the judgments reversed.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW HAS DECIDED TWO FEDERAL QUESTIONS OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The cases used by the Oklahoma Court of Criminal Appeals in arriving at its decision, *Katz* v. *U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *U.S.* v. *Magana*, 512 F.2d 1161 (9th Cir.) *cert. denied*, 423 U.S. 826, 96 S.Ct. 42, 45 L.Ed.2d (1975) and *Tate* v. *State*, 544 P.2d 531 (Ok. Cr. 1975), are not in point either as to the law or as to the facts and should not be persuasive authority.

In *Katz* v. *U.S.*, supra, the Supreme Court stated that the Fourth Amendment protects people, not place; that a private home is an area protected by the Fourth Amendment.

In this case, the Petitioner, Eugene Finch, was enticed from the privacy of his home into an open doorway by the police and then subjected to a warrantless arrest.

The police should not be permitted to use the exceptions to the requirement that a valid warrant be obtained to circumvent the requirement in a case where it is obvious that a warrant should have been obtained.

2. THE FEDERAL CONSTITUTIONAL QUESTIONS ARE OF IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

It is necessary to draw a line between the rights of the police in enforcing the law and the rights of individuals to be free from illegal harassment in the course of that enforcement.

The requirements that a valid warrant be obtained where no exigent circumstances exist, were ignored in this case. Sufficient time existed to obtain a warrant (3 days). The police considered getting a warrant. An assistant District Attorney advised that they could "get by" without one. The casual way the surveillance was conducted negated the possibility of exigent circumstances.

Furthermore, the two Petitioners could not have spirited five vehicles away during the time required to obtain a warrant, or the officers could have kept the vehicles under surveillance until a warrant was secured.

3. THE FEDERAL LAW ON THE CONSTITUTIONALITY OF WARRANTLESS ARREST AND WARRANTLESS SEARCH AND SEIZURE, SEEMS TO BE IN CONFLICT WITH THE STATE LAW.

The crux of the matter is, that although there were neither exigent circumstances nor hot pursuit in this case, nor was the Petitioner Eugene Finch in a public place on his own volition without expectation of privacy, the Oklahoma State Court of Criminal Appeals waived all these constitutional safeguards and upheld the conviction of the Petitioners.

The cases cited by the Attorney General of the State of Oklahoma indicate, that although the criminal justice system pays lip service to the rule that warrantless arrests in felony cases and warrantless searches and seizures be limited to cases where there was no time to obtain a warrant, with a few sharply defined exceptions involving exigent circumstances as set forth in *Coolidge* v. *New Hampshire*, 103 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 564, and subsequent cases including *Payton* v. *New York*, 445 U.S. 573, in practice the system erodes the rule so that it becomes meaningless, and warrants are not required unless law enforcement officers choose to obtain a warrant.

The State cited the following cases and they circumvent the issues. In *Tate* v. *State*, 544 P.2d 531 (Ok. Cr. 1975), the court held that the defendant had no reasonable expectation of privacy in his own driveway, and his Fourth Amendment rights were not violated though the officer technically violated his rights by a technical trespass onto defendant's driveway and had no warrant mentioning the truck or camper.

In *Hughes* v. *State*, 552 P.2d 1154 (Ok. Cr. 1976), the Oklahoma Court of Criminal Appeals properly stated that every search made without a warrant is unreasonable unless circumstances bring it within one of the few well-defined exceptions of the warrant requirement, and then decided that the vague intimations and suspicions of the officer constituted probable cause and exigent circumstances existed. In other words, the results justified the warrantless search.

In *Dick* v. *State*, 596 P.2d 1265 (Ok. Cr. 1979), the court held that no search or seizure occurs when an officer observed items in a car that were in plain view and then seizes anything that he believes is contraband, a weapon or anything used in committing a crime or other evidence of a crime, without obtaining a search warrant.

SUMMARY

These cases indicate that in cases involving an alleged criminal act, the Oklahoma Courts, and especially the Oklahoma Court of Criminal Appeals, hold as harmless error any Constitutional rights violations that might result in reversing the decision in the case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

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August, 1982

APPENDIX A

THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

[Filed May 11, 1982]

EUGENE FINCH and VESTA MAE FINCH, Appellants,	)	
-vs-	)	No. F-80-541
THE STATE OF OKLAHOMA, Appellee.	)	

OPINION

CORNISH, Judge:

The appellants appeal their convictions rendered in the District Court of Muskogee County for Knowingly Concealing Stolen Property. All cases were tried to the court at one time. Eugene Finch was convicted in CRF-78-408 and CRF-78-409; Vesta Mae Finch was convicted in CRF-79-12 and CRF-79-13. In each of the cases the appellants both received concurrent five-year sentences with four years suspended.

The appellants' first three propositions deal with the questions of whether the warrantless arrest of Eugene Finch violated his constitutional rights; and whether the warrantless seizure of stolen automobiles parked at the appellants' home was the result of an illegal search and seizure.

Several vehicles suspected to have been stolen were parked in the driveway of the appellants' residence. Acting on police information, the arresting officer, a highway patrolman, observed the license tag numbers of the cars from the street. He ran a check on the tag numbers to confirm that they were stolen. For three to four days the residence was kept under surveillance because police believed that

one of the stolen vehicles would soon be used to transport stolen goods to Tulsa.

The trooper made the warrantless arrest within approximately three hours of learning that one of the residents was aware of the surveillance. He testified that it took that amount of time to organize a group of local law enforcement officers to drive to the scene.

Eugene Finch argues that the warrantless seizure of the vehicles from his residence was unreasonable under the Fourth Amendment and that the evidence relating to them should have been excluded.

In evaluating the appellant's Fourth Amendment claim we turn to the leading case on the coverage of the Fourth Amendment, *Katz* v. *U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), where the Supreme Court held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." The Supreme Court has also repeatedly held that the primary objective of the Fourth Amendment is not protection of property rights, but protection of privacy. *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Cardwell* v. *Lewis*, 417 U.S. 533, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

In *Tate* v. *State*, 544 P.2d 531 (Okl.Cr. 1975), to determine whether a reasonable expectation of privacy existed, we applied a test generally derived from Justice Harlan's concurring opinion in *Katz*, supra;

> [T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.

Justice Harlan went on to illustrated his point by stating that "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements

that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."

A reasonable expectation of privacy, not common law property distinctions, controls the scope of the Fourth Amendment. *U.S.* v. *Magna*, 512 F.2d 1169 (9th Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 42, 46 L.Ed.2d 43 (1975). There the Ninth Circuit wrote:

> A driveway is only a semiprivate area. The expectation of privacy which a possessor of land may reasonably have while carrying on activities on his driveway will generally depend upon the nature of the activities and the degree of visibility from the street. It would be equally unwise to hold, as a matter of law, that all driveways are protected by the Fourth Amendment from all penetrations by police officers as to hold that no driveway is ever protected from police incursions. The test in each case would be that of reasonableness, both the possessor's expectations of privacy and of the officers' reasons for being on the driveway.

Furthermore, a technical trespass should not necessarily be deemed a fourth amendment search when no expectations of privacy are disappointed. *United States* v. *Polk*, 433 F.2d 644 (5th Cir. 1970).

The record indicates that Eugene Finch did not attempt to preserve any privacy with regard to the stolen vehicles which were parked in his driveway in full view of the public. They were therefore not subject to fourth amendment protection. *See Dick* v. *State*, 596 P.2d 1265 (Okl. Cr. 1979); *Tate* v. *State, supra.*

We likewise hold that there was no illegality in the warrantless arrest of Eugene Finch on his doorsteps. In *United States* v. *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L. Ed.2d 300 (1976), the Supreme Court relying on *Katz*, held that there was no reasonable expectation of privacy in the

doorway of one's home; consequently, the warrantless felony arrest of the defendant, Santana, in her doorway did not violate the Fourth Amendment:

> While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy.

Additionally, the fact that the police might have had sufficient time to obtain a warrant is not controlling. In *United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L. Ed.2d 598 (1976), the Supreme Court wrote that law enforcement officers may find it wise to seek arrest warrants where practicable to do so; that their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. But the Court further stated:

> [W]e decline to transform this judicial preference into an unconstitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

We accordingly find no impropriety in the admission of evidence and testimony relating to these issues.

Next the appellants complain that the verdict is not supported by the evidence, claiming that the elements in 21 O.S.1971, § 1713(2) were not proven by the State. We disagree. The evidence presented by the State was sufficient to prove to the jury beyond a reasonable doubt that

the appellants knew or had reasonable cause to believe that the items were stolen. Where there is evidence from which the trier of fact could conclude that the defendant was guilty as charged, this Court will not interfere with the verdict even though there may be sharp conflicts in the evidence. *Renfro* v. *State*, 607 P.2d 703 (Okl.Cr. 1980).

Finally, the complaint of excessive punishment does not warrant discussion.

The judgment and sentence is therefore AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA
THE HONORABLE LYLE BURRIS,
ASSOCIATE DISTRICT JUDGE

EUGENE FINCH and VESTA MAE FINCH, appellants, were convicted for Knowingly Concealing Stolen Property in the District Court of Muskogee County. Eugene Finch was convicted in CRF-78-408 and CRF-78-409 and received two five (5) year prison sentences, with four years suspended on each; and appeals. Vesta Mae Finch was convicted in CRF-79-12 and CRF-79-13 and received two five (5) years prison sentences, with four years suspended from each; and appeals. AFFIRMED.

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BUSSEY, J., CONCURS
BRETT, P.J., DISSENTS